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No. 08-539

IN THE
Supreme Court of the United States

REPUBLIC OF IRAQ, *ET AL.*,

Petitioners,

v.

ROBERT SIMON, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE OF THE HUMAN RIGHTS COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION SUPPORTING AFFIRMANCE

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International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 9, 1966) 5-6, 18

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U.N. G.A. Res. 62/148 (18 Dec. 2007), U.N. Doc. A/RES/62/148 (4 Mar. 2008) 8

H.R. Comm., General Comment No. 20 (1992), U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) 6-7

H.R. Comm., General Comment No. 24, U.N. GAOR, U.N. Doc. CCPR/C/Rev.1/add.6 (2 Nov. 1994) 7

Universal Declaration of Human Rights, U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948) 8

MISCELLANEOUS MATERIALS

1 Commentary, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC, Jean S. Pictet ed. 1952) 4

3 Commentary, *Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC, Jean S. Pictet ed. 1960) 4

4 Commentary, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Jean S. Pictet ed. 1958) 4

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2 *American Legal Records, Select Cases of the Mayor's Court of New York City 1674-1784* (R. Morris ed. 1935) 9-10

1 *The Law Practice of Alexander Hamilton* (J. Goebel ed. 1964) 10

8 *Annals of Cong.* 1980 (1798) 16

Jordan J. Paust, Jon M. Van Dyke, Linda A. Malone, *International Law and Litigation in the U.S.* (2 ed. 2005) 6, 10

Jordan J. Paust, M. Cherif Bassiouni, *et al.*, *International Criminal Law* 6 (3 ed. 2007) . 3

Jordan J. Paust, *International Law as Law of the United States* (2 ed. 2003) ..... *passim*

Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503 (2003) 5, 18

Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. Davis J. Int'l L. & Pol'y 205 (2008) 16

G. Wood, *The Creation of the American Republic 1776-1787* (1969) 10

INTEREST OF AMICUS CURIAE

Amicus Curiae, the Human Rights Committee of the American Branch of the International Law Association, is composed of lawyers and professors of law who have practiced and/or lectured and/or published widely on these and related matters.[1]

Members of *Amicus* are strongly committed to the rule of law. They believe that it is important for the United States to adhere to the rule of law both domestically and with respect to its international legal obligations. No nation can be a leader internationally unless it honors its treaty obligations. In its traditional commitment to the rule of law, the United States has a proud tradition of leadership in seeking to end torture, and particularly in working to protect prisoners of war from torture. It would be a clear and serious violation of treaty obligations of the United States to absolve Iraq of its liability for its brutal torture of American prisoners of war and civilians counter to the mandatory language in Article 131 of the Geneva Convention Relative to the Treatment of Prisoner of War of 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316, and in Article 148 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, among other treaties.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

The significant and historic case of *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), concerned with the protection of American POWs from torture by the enemy, is still before the courts and the decision of this Court will be of critical importance in protecting these and future American POWs held by enemies of the U.S. In that connection, members of *amicus* are experts in international law and the foreign relations law of the United States and seek to bring to this Court's attention a core foreign relations law principle that is of enduring importance in interpreting United States statutes. As announced by Chief Justice Marshall, "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and, consequently can never be construed to violate . . . rights . . . further than is warranted by the law of nations." *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

SUMMARY OF ARGUMENT

Relevant treaty-based and customary international law (and the Geneva Prisoner of War Convention and the Geneva Civilian Convention, in particular) provides rights to Respondents, including rights to an effective remedy against Iraq. Under venerable Supreme Court doctrine, relevant federal legislation must be interpreted consistently with international law and, therefore in this instance, with rights of Respondents under international law to obtain compensation and damages. After proper interpretation of a relevant statute, even if there is still a potential clash between relevant federal legislation and treaty law of the U.S., additional venerable Supreme Court doctrine requires the primacy

of treaty-based rights in this instance because there is no clear and unequivocal expression of congressional intent to override such treaty-based rights within relevant legislation. Even if there had been an expression of such a clear and unequivocal intent, exceptions to the last in time rule (which rule might otherwise result in the primacy of a subsequent federal statute) would be applicable.

ARGUMENT

I. Rights of Respondents Exist Under International Law.

In this instance, Respondents, who are American former prisoners of war and civilians, have rights under treaties and customary international law, especially the right to compensation, reparation or damages. Their rights exist, for example, under Article 3 of the 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, 36 Stat, 2277, T.S. No. 539 (Oct. 18, 1907) (a "belligerent . . . shall . . . be liable to pay compensation")[2]; Article 131 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316 ("liability incurred . . . in respect of breaches" of the Convention)[3]; and Article 148 of the Geneva Convention

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[2] Iraq has not ratified this treaty, but it was recognized as reflecting customary international law by 1939 in the International Military Tribunal at Nuremberg. *See, e.g.*, Jordan J. Paust, M. Cherif Bassiouni, *et al.*, *International Criminal Law* 6, 463, 639 (3 ed. 2007).

[3] Iraq and the U.S. are parties to this treaty and it also reflects customary international law.

Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 (same).[4] Such rights also exist under customary laws of war. More generally, Justice Breyer has recognized that universal jurisdiction with respect to "torture . . . and war crimes" "necessarily contemplates a significant degree of civil tort recovery." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring).

Concerning rights to a remedy and compensation for violations of the 1949 Geneva Conventions, see also 1 Commentary, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 83-84 (ICRC, Jean S. Pictet ed. 1952) (rights exist and claims are "to be evoked before an appropriate national court by the protected person who has suffered the violation"); 3 Commentary, *Geneva Convention Relative to the Treatment of Prisoners of War* 630 (ICRC, Jean S. Pictet ed. 1960) (a violator state is "liable to pay . . . material compensation for breaches of the Convention"); 4 Commentary, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 209-11 (ICRC, Jean S. Pictet ed. 1958); U.N. S.C. Res. 674, paras. 8-9 (Iraq "is liable for any loss, damage or injury arising in regard to . . . [certain states] and their nationals") (Oct. 29, 1990); U.N. S.C. Res. 670, para. 13

[4] Iraq and the U.S. are parties to this treaty and it also reflects customary international law. The obligation in Article 148, like that in the Geneva Prisoner of War Convention, is set forth in mandatory "shall" language as a self-executing obligation, since it is a "negative" obligation requiring no subsequent legislative or executive action to take effect. It is binding on all States Parties to the Convention, including both the United States and Iraq.

(Sept. 25, 1990) (regarding violations of Geneva law and other international law in Kuwait, "Iraq . . . is liable under the Convention for grave breaches committed by it, as are individuals"); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503, 516 & n.45 (2003) [hereinafter Paust, *Judicial Power*], quoted elsewise in *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004).

Respondents also have customary rights to compensation reflected in Article 14(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (Dec. 10, 1984).[5] Further, Respondents have treaty-based and customary rights to a remedy and access to courts in Articles 2(3)(a), 14(1),[6] and through Article 50, of the International Covenant on Civil and Political

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[5] Iraq had not ratified this treaty, so the Convention does not provide treaty-based rights vis-à-vis Iraq at the relevant times.

[6] ICCPR, *supra*, arts. 2(3)(a) ("ensure that any person whose rights . . . are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity"), 14(1) ("All persons shall be equal before the courts and tribunals. In the determination of . . . his rights and obligations in as suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"), 999 U.N.T.S. 171 (Dec. 9, 1966) [hereinafter ICCPR]. Both provisions are set forth with mandatory "shall" language that is typically self-executing.

Rights (ICCPR), 999 U.N.T.S. 171 (Dec. 9, 1966),[7] as supplemented by General Comments of the Human Rights Committee under the auspices of the treaty. Article 50 of the Covenant mandates that all of "[t]he provisions of the present Covenant shall extend to all parts of federated States without any limitations or exceptions,"[8] thereby assuring that rights and duties under the treaty apply in judicial proceedings within the United States. *See also* Jordan J. Paust, Jon M. Van Dyke, Linda A. Malone, *International Law and Litigation in the U.S.* 340-42 (2d ed. 2005); *Dubai Petroleum Co.* v. *Kazi*, 12 S.W.3d 71, 82 (Tex. 2000) ("Article 14(1) [of the ICCPR] requires all signatory countries to confer the right of equality before the courts . . . [and] guarantees . . . equal access to these courts" to pursue a remedy); H.R. Comm., General Comment No. 20, para. 15 (1992) ("right to an effective remedy, including compensation"), U.N. Doc. HRI/GEN/

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[7] Iraq ratified this treaty on January 25, 1971, although the U.S. did not ratify until April, 1992.

[8] ICCPR, *supra* art. 50. Article 50 is set forth with mandatory "shall" language that is typically self-executing. Moreover, it expressly requires that all provisions of the Covenant apply in all parts of a federated state without exception. The United States had no reservation with respect to Article 50 and it operates within the United States. *See Jordan J. Paust, International Law as Law of the United States* 362 (2 ed. 2003) [hereinafter *Paust, International Law*]. Further, the attempted declaration of partial non-self-execution (it does not apply to Article 50) was recognized as being void *ab initio* as a matter of law. *Id*. Articles 2(3)(a) and 14(1) are expressed in mandatory "shall" language that is typically self-executing. *See id*. at 72, 90 n.98, 129-30 n.14.

1/Rev.1 at 30 (1994); H.R. Comm., General Comment No. 24, paras. 11 ("[A] State could not make a reservation to Article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy"), 12 ("where there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts . . . all the essential elements of the Covenant guarantees have been removed" and an attempted reservation to that effect is void *ab initio* as a matter of law because it "would be incompatible with the object and purpose of the Covenant." *Id.* at paras. 9, 11-12); U.N. GAOR, U.N. Doc. CCPR/C/Rev.1/add.6 (2 Nov. 1994).

The human rights of Respondents also apply universally and in all social contexts as part of the legal obligation of all members of the United Nations under the United Nations Charter to ensure "universal respect for, and observance of, human rights."[9] These rights

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[9] *See, e.g.*, U.N. Charter, arts. 55(c), 56; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance With the Charter of the United Nations, U.N. G.A. Res. 2625 (Oct. 24, 1970), 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971) ("Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881-82 (2d Cir. 1980) (observing with respect to Articles 55(c) and 56 of the Charter that "the guarantees include, at a bare minimum, the right to be free from torture. This prohibition has become part

(Cont'd)

include "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights" of individuals. Universal Declaration of Human Rights, U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948). The U.N. General Assembly has reaffirmed the need for a remedy with respect to ill-treatment of human beings in violation of relevant human rights. *See, e.g.*, U.N. G.A. Res. 63/166, para. 18 (18 Dec. 2008) ("Stresses that national legal systems must ensure that victims of torture and other cruel, inhuman or degrading treatment or punishment obtain redress, are awarded fair and adequate compensation and receive appropriate social and medical rehabilitation"), U.N. Doc. A/RES/63/166 (19 Feb. 2009); U.N. G.A. Res. 62/148, para. 13 (18 Dec. 2007), U.N. Doc. A/RES/62/148 (4 Mar. 2008).

We also note that it is classic international law that a state is liable for its actions, and that a change of government does not release that liability. This is also the official view of the United States. Any other rule would severely undermine the rule of law in international affairs.

(Cont'd)

of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III) (A) (Dec. 10, 1948) which states in the plainest of terms, 'no one shall be subjected to torture.' The General Assembly has declared that the Charter precepts embodied in this Universal Declaration 'constitute basic principles of international law.' G.A. Res. 2625 (XXV) (Oct. 24, 1970)" [the 1970 Declaration on Principles of International Law]).

II. Rules Recognized By This Court Require the Primacy of International Legal Rights of Respondents.

A. Relevant Legislation Must Be Interpreted Consistently With International Law.

Relevant federal legislation must be interpreted consistently with international law and, therefore, must be interpreted consistently with the rights of Respondents under treaty-based and customary international law, including their rights to an effective remedy noted in Part I, *supra*. As this Court famously recognized in *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804) (Marshall, C.J.), "[a]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently can never be construed to violate . . . rights . . . further than is warranted by the law of nations." Importantly, Chief Justice Marshall's recognition added the point that statutes "can never be construed to violate" rights under international law, although international law might place limits on such rights. There were other early recognitions of this fundamental rule of construction. *See, e.g.*, *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); 1 Op. Att'y Gen. 26, 27 (1792); *see also id.* at 53 (stating that the municipal law is strengthened by the law of nations); *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792); *The Resolution*, 2 U.S. (2 Dall.) 1, 4 (1781); 11 Op. Att'y Gen. 297, 299–300 (1865); 9 Op. Att'y Gen. 356, 362–63 (1859); *The Ship Rose*, 36 Ct. Cl. 290, 301 (1901); *The Schooner Nancy*, 27 Ct. Cl. 99, 109 (1892); *Rutgers v. Waddington*, Mayor's Court of the City of New York (1784) (cited in 2

American Legal Records, Select Cases of the Mayor's Court of New York City 1674–1784, at 302 (R. Morris ed. 1935)) (construing the 1783 N.Y. Trespass Act consistently with the Treaty of Peace), discussed in 1 *The Law Practice of Alexander Hamilton* 413–14 (J. Goebel ed. 1964); G. Wood, *The Creation of the American Republic* 1776–1787, at 457–58 (1969). This paramount rule of construction has been reiterated in many modern judicial opinions in this Court and others. *See, e.g.*, Paust, Van Dyke, Malone, *supra* at 155-56, and cases cited therein and in Part II.B. *infra*.

Here, there is no legislation that might suggest a clash with the rights of Respondents under the laws of war and other international law, but if there were, the legislation would have to be interpreted so as to avoid any clash with and "never ... to violate" their rights under international law.

B. Treaty Rights Would Trump Inconsistent Legislation In Any Event.

As noted, the rule of construction affirmed in *The Charming Betsy* has been retained by the Supreme Court. Additionally, there has been built into such a rule a stronger primacy for international treaty law, since under the revised rule of construction an unavoidable clash between a treaty or other international agreement and an act of Congress will not even arise unless there is a clear and unequivocal expression of congressional intent to supersede the treaty within the statute. In other words, even if the statute is subsequent in time, treaty law will prevail unless there is a clear and unequivocal expression of congressional intent to

override a particular treaty. *See, e.g.*, *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) (a "congressional expression [to override is] necessary"); *Cook v. United States*, 288 U.S. 102, 120 (1933) (the purpose to override or modify a treaty must be "clearly expressed": "A treaty will not be deemed to have been abrogated or modified [domestically] by a later statute unless such purpose on the part of Congress has been clearly expressed"); *Cheung Sum Shee v. Nagle*, 268 U.S. 336, 345-46 (1925) (the "Act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude . . . a congressional intent absolutely to exclude"); *United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902) (the "purpose . . . must appear clearly and distinctly from the words used" by Congress); Paust, *International Law*, *supra* note 8, at 99, 107, 120, 124-125 nn.2-3, and other cases cited; *see also Spector v. Norwegian Cruise Line, Ltd.*, 545 U.S. 119, 142 (2005) (Ginsburg, J., concurring); *Beharry v. Reno*, 183 F. Supp. 2d 584, 593–602 (E.D.N.Y. 2002) (regarding statutory construction consistent with the ICCPR and other international law); *United States v. The Palestine Liberation Org.*, 695 F. Supp. 1456, 1465, 1468 (S.D.N.Y. 1988) ("Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty . . . does the later enacted statute take precedence. *E.g.*, *The Chinese Exclusion Case*, . . . 130 U.S. [581] at 599-602 [1889] (finding clear intent to supersede); *Edye v. Robertson* (*The Head Money Cases*), 112 U.S. 580, 597-99 . . . (1884) (same. . . .) . . . [also citing *Cook*, among other cases]. . . . *Chew Heong* [112 U.S. 536 (1884)] and its progeny . . . require the clearest of expressions on the part of Congress.").

Because no clash will be found to arise where there is no clear and unequivocal expression of congressional intent to override a treaty within a relevant federal statute, application of the last in time rule that might otherwise lead to the primacy of a federal statute that was enacted after a relevant treaty was ratified by the President will not be possible.

In this instance, there is no clear and unequivocal expression of congressional intent to supersede any relevant treaty or treaty-based right of Respondents that is expressed within the relevant statute, *i.e.*, within section 1503 of the Emergency Wartime Supplemental Appropriations Act for the Iraq War, Pub. L. No. 108-11, 117 Stat. 559 (2003) (EWSAA). In fact, there is no mention of any court, the jurisdiction of any court, or a supposed delegation of court-stripping power to the President. *See also Acree v. Republic of Iraq*, 370 F.3d 41, 51, 55 (D.C. Cir. 2004) (it was "not intended to alter the jurisdiction of the federal courts under the FSIA"). Further, the sense of Congress was clearly expressed in the 2008 National Defense Authorization Act (NDAA), § 1083(c)(4), Pub. L. No. 110-181 (Jan. 28, 2008), 122 Stat. 343-44, when Congress declared: "[n]othing in section 1503 of the Emergency Wartime Supplemental Appropriations Act . . . has ever authorized, directly or indirectly, the . . . removal of the jurisdiction of any court of the United States." There, Congress clearly supported judicial power to continue American former prisoner of war and civilian cases and clearly stated that it had never intended directly or indirectly to give the President any power to remove the jurisdiction of any court. *See also Simon v. Republic of Iraq*, 529 F.3d 1187, 1194 (D.C. Cir. 2008) ("Reading the NDAA, as we do, to

leave intact jurisdiction over cases pending under former § 1605(a)(7)"). Indeed, the Congress of the United States, which has passed multiple resolutions supporting our 1991 Gulf War POWs, would never have authorized the President to enter our courts on the side of their torturers to seek effectively to absolve them of liability, much less retroactively to seek to remove the jurisdiction of the federal district court which awarded the POWs' judgment.

Clearly, relevant treaty rights of Respondents must prevail under *Weinberger*, *Cook*, *Lee Yen Tai*, and other Supreme Court cases, since there was no clear and unequivocal expression of congressional intent in any federal statute to deny rights of Respondents under any treaty of the United States, especially their rights to pursue remedies in the courts. Later, in the 2008 National Defense Authorization Act, Congress even expressed its intent not to strip federal courts of jurisdiction to hear rights of American former prisoners of war and civilians under the laws of war and other international law.

C. Exceptions to the Last In Time Rule Would Apply Even If the Last In Time Rule Could Apply.

Even assuming that Congress had clearly and unequivocally expressed an intent in legislation to supersede any relevant treaty rights of Respondents and the last in time rule might otherwise come into play, decisions of this Court have recognized that there is a "rights under" treaties exception to the last in time rule

that would necessarily guarantee the primacy of treaty-based rights of Respondents in these cases. There has also been recognition of a law of war exception.

1. The "Rights Under" Treaties Exception.

The first exception to the last in time rule in these cases would be the "rights under" treaties exception that has been recognized in several Supreme Court and other cases. *See, e.g.*, *Jones v. Meehan*, 175 U.S. 1, 32 (1899); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 247 (1872); *Reichart v. Felps,* 73 U.S. (6 Wall.) 160, 165-66 (1867); *Wilson v. Wall*, 73 U.S. (6 Wall.) 83, 89 (1867); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 631-32 (1857) (Curtis, J., dissenting); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 749, 755 (1835); Paust, *International Law*, *supra* note 8, at 104-05, 120, 137-39 nn.39-49, revised from 28 Va. J. Int'l L. 393, 410-14 (1988); *see also Smith v. Stevens*, 77 U.S. (10 Wall.) 321, 327 (1870) (stating that a joint resolution of Congress could not relate back to give validity to a land conveyance that was void under a treaty); *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232-33 (1850) (an 1836 act of Congress could not "help the patent, it being of later date than the treaty" of 1824 which had conferred part of the title to property in others); *Chase v. United States*, 222 F. 593, 596 (8th Cir. 1915) ("Congress has no power . . . to affect rights . . . granted by a treaty"), *rev'd on other gds.*, 245 U.S. 89 (1917); *Elkison v. Deliesseline*, 8 F. Cas. 493, 494-96 (C.C.D.S.C. 1823) (No. 4,366) (Johnson, J., on circuit) (state law attempting to allow seizure of "free negroes and persons of color" on ships that come into its harbors directly conflicts with the "paramount and exclusive" federal commerce power, "the treaty-making power,"

and "laws and treaties of the United States" by "converting a right into a crime," and a plea of necessity to protect state security does not obviate the primacy of the laws and treaties of the U.S. Further, a restriction of a treaty right by legislation, "even by the general government," cannot prevail).

Clearly, the Respondents in these cases have relevant rights under treaties of the United States (including the Geneva Prisoner of War Convention, the Geneva Civilian Convention, and the United Nations Charter – *see* Part I *supra*) and, under venerable Supreme Court rulings recognizing the "rights under" treaties exception to the last in time rule, such rights would ultimately prevail even against federal legislation enacted after ratification of relevant treaties.

2. The Law of War Exception.

The second exception to the last in time rule in these cases would be the law of war exception, which guarantees the primacy of the laws of war. *See, e.g.*, *Miller v. United States*, 78 U.S. (11 Wall.) 268, 315-15 (1870) (Field, J., dissenting); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) ("If a general war is declared [by Congress], its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations" – thus recognizing that congressional power is restricted by the laws of war); 11 Op. Att'y Gen. 297, 299-300 (1865) ("Congress cannot abrogate [the "laws of war"] . . . laws of nations . . . are of binding force upon the departments and citizens of the Government. . . . Congress cannot abrogate them or authorize their infraction. The Constitution does not

permit this Government [to do so either]"); Paust, *International Law*, *supra* note 8, at 106-07, 120, 141-42 nn.52-57; Representative Albert Gallatin, remarks, 8 *Annals of Cong.* 1980 (1798) ("By virtue of . . . [the war power], Congress could . . . [act], provided it be according to the laws of nations and to treaties."), quoted in *United States ex rel. Schlueter v. Watkins,* 67 F. Supp. 556, 564 (S.D.N.Y. 1946); *see also United States v. Macintosh*, 283 U.S. 605, 622 (1931), *overruled on other gds.*, *Girouard v. United States*, 328 U.S. 61, 69 (1945) (the war power "tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law"); *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331, 354-55 (1871) (Field, J., dissenting); *The Charming Betsy*, 6 U.S. at 77 (counsel arguing that "[a]s far as Congress have thought proper to legislate us into a state of war, the law of nations in war is to apply"). More generally, the Founders, Framers and early judiciary affirmed the fundamental expectation that Congress is bound by the law of nations. *See, e.g.*, Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. Davis J. Int'l L. & Pol'y 205, 217-39 (2008), and cases cited.

Clearly, the Respondents in these cases have relevant rights under the laws of war (*see* Part I *supra*) and, under the law of war exception to the last in time rule, such rights would ultimately prevail even against a newer federal statute.

III. The Judiciary Has Authority to Protect Rights of Respondents.

The Judiciary has authority to protect rights of Respondents. As Chief Justice Marshall recognized concerning the textual commitment to the judiciary of authority to decide cases arising under treaties, "[t]he reason for inserting that clause [Article III, § 2 of the U.S. Constitution] was, that all persons who have real claims under a treaty should have their causes decided" by the judiciary and that "[w]henever a right grows out of, or is protected by, a treaty, . . . it is to be protected" by the judiciary. *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809). The next year, he confirmed a fundamental expectation of the Framers concerning an essential reach of judicial power when he affirmed that our judicial tribunals "are established . . . to decide on human rights." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810).[10] With respect to judicial power and the laws of war in particular, this Court has stressed, "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of . . . individuals." *Ex parte Quirin*, 317 U.S. 1, 27 (1942). The Geneva Conventions expressly recognize private rights and contemplate compensation in courts of law, a sanction practice that predates the conventions and exists more generally with respect to

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[10] Concerning the rich history of Founder, Framer, and judicial attention to human rights (which are generally at stake in these cases) and their use in thousands of federal and state cases, *see, e.g.*, Paust, *International Law*, *supra* note 8, at 193-223.

violations of treaty-based and customary laws of war. *See, e.g.*, Paust, *Judicial Power*, *supra* at 516 & nn.43-45, and cases cited. Additionally, other rights "grow out of" the Geneva Conventions, the ICCPR, and the United Nations Charter within the meaning of *Owings*. *See, e.g.*, *id.*

Never in the history of this country has the Supreme Court ever held that an act of Congress that mentions neither jurisdiction nor the courts is capable of stripping the courts of jurisdiction and never has any such power been found to be delegatable to the Executive branch to prevent judicial review of presidential action.

Our soldiers who have been prisoners of war and civilians who were kidnapped and tortured deserve any logical and policy-serving interpretation of the law in favor of what are clearly their rights under international law. A counter interpretation could have a devastating effect in encouraging future torture and inhumane treatment of American prisoners of war, would threaten the rule of law, and would pose a serious threat to judicial independence that is not countenanced by the Constitution.

CONCLUSION

Respondents in these cases have rights under international law, including rights to an effective remedy against Iraq. Under venerable Supreme Court doctrine, relevant federal legislation must be interpreted consistently with international law and, therefore in this instance, with rights of American former prisoners of war and civilians under international law to obtain

compensation and damages. Even if there is still a potential clash between relevant federal legislation and treaty law of the U.S., additional venerable Supreme Court doctrine requires the primacy of treaty-based rights in this instance because there is no clear and unequivocal expression of congressional intent to override such treaty-based rights within relevant legislation. Even if there had been such a clear and unequivocal expression of intent, application of the "rights under" treaties exception to the last in time rule or the law of war exception would result in the primacy of the treaty-based rights of American former prisoners of war and civilians.

We urge this Court to apply *The Charming Betsy* rule of construction and affirm the Court of Appeals decision below rejecting the interpretation of Section 1503 of EWSAA that would violate the treaty obligations of the United States by absolving Iraq of liability for its brutal torture of American POWs and civilians during the 1991 Gulf War.

Amicus curiae the Human Rights Committee of the American Branch of the International Law Association respectfully request affirmance of the decisions of the Court of Appeals below with respect to Section 1503 of the 2003 Emergency Wartime Supplemental Appropriations Act.

Respectfully submitted,

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